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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

NO. 195

COLUMBUS & GREENVILLE RAILWAY CO., ET AL.,

Petitioners,

VS.

W. J. MILLER, STATE TAX COLLECTOR, Etc.,

Respondent.

Petitioner's Response to Respondent's Brief in Opposition to Application for Writ of Certiorari

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NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Appellants.

VS.

W. J. MILLER, State Tax Collector, Etc.,

Appellee.

Petitioner's Response to Respondent's Brief in Opposition to Application for Writ of Certiorari

This case is before the Court on petition for writ of certiorari, for the reason that the supreme court of the state of Mississippi erroneously decided that chapter 259 Mississippi laws 1926 violated the fourteenth amendment to the constitution of the United States, thereby depriving the petitioners of that immunity from liability which it had under chapter 259 Mississippi laws 1926, based on petitioners' claim that the same was valid and consistent with the fourteenth amendment to the constitution of the United States. And the case is also before the court on the petitioners' appeal from the judgment of the supreme court of the state of Mississippi wherein it not only held that chapter 259 Mississippi laws 1926 violated the fourteenth amendment to the

constitution of the United States, but over the objection of petitioners that chapter 282 Mississippi laws 1914 violated the fourteenth amendment to the constitution of the United States if revived and enforced against it under the facts in this case, held that said act of 1914 was in full force and effect by reason of the invalidity as applied to the fourteenth amendment of the act of 1926 and enforced and applied the same under the facts of this case against petitioner. Petitioners, in compliance with the rules of this Court, filed a statement of the gounds of jurisdiction on which the appeal was predicated, to which statement respondent's counsel have made no response. However, respondent's counsel have replied to petitioners' brief accompanying application for writ of certiorari, in reply to which we respectfully submit as follows:

1st.

Decision Does Not Rest on Question of State Law.

The supreme court of the state of Mississippi did not base its decision upon any construction of the constitution of the state of Mississippi. Upon the other hand, without reference to the constitution of the state of Mississippi, it held that the act in question violated the fourteenth amendment to the constitution of the United States, and, therefore, was void upon its face. The rule contended for by opposing counsel has no application except where the decision of the state court is put upon a federal and a non-federal ground, and if the non-federal ground is broad enough to sustain the judgment, this court will not review the federal question. See *McCoy v. Shaw*, 277 U. S. 302, 72 L. ed. 891, and cases

therein cited. In the case of *Illinois Central vs. Messina*, 240 U. S. 395, 60 L. ed. 709, this court held that wherever the supreme court of the state thought it necessary to construe a federal act, it indicated that such construction was material to the result. So in this case, the supreme court of the state of Mississippi did not mention the state constitution but expressly put its decision upon the fourteenth amendment to the federal constitution, it conclusively indicated that the supreme court of the state of Mississippi thought such construction necessary to reach the result which it did. The decision of the supreme court of the state of Mississippi legally amounts to the announcement that in so far as the constitution of the state of Mississippi was concerned, the act of 1926 did not violate any portion thereof. Section 14 of the Bill of Rights of the state of Mississippi contains the following language:

> "No person shall be deprived of life, liberty or property except by due process of law."

There is no provision, however, prohibiting a denial of the equal protection of the law. The provision is patterned after the fifth amendment to the constitution of the United States, which is controlling upon congress while the fourteenth amendment to the constitution of the United States, is applicable only to state legislation. *Hodges v. U. S.* 203 U. S. 1, 51 L. ed. 61. *Twining vs. New Jersey*, 211 U. S. 78, 53 L. ed. 97; *Thorington v. Montgomery*, 147 U. S. 490, 37 L. ed. 252. The fourteenth amendment to the constitution of the United States prohibits deprivation of property without due process of law by a state, as well as the denial of the equal protection of the law, whereas the four-

teenth section of the bill of rights of the state of Mississippi deals only with deprivation of property without due process of law, which has a fixed meaning in the jurisprudence of this country. *Civil Right Cases*, 109 U. S. 3, 27 L. ed. 835; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215. To be deprived of the equal protection of the law means all persons are not treated alike under the same circumstances. *Leefer v. Texas*, 139 U. S. 462, 35 L. ed. 225. *Quaker City Cab Co. v. Pa.*, 277 U. S. 389, 72 L. ed. 927.

Counsel for respondent call attention to the fact that in the state court they urged upon the supreme court of the state of Mississippi that the act of 1926 violated section 234 of the Mississippi constitution, which is found on page 32 of Counsel's brief. The constitutional provision prohibits the passage of any law affecting the taxation or revenue in a levee district unless and until the act shall have been published as required therein. This was the constitutional question urged before the supreme court of the state of Mississippi. It had been thoroughly settled, however, by the supreme court of the state of Mississippi in a long line of cases that the court could not look beyond the enrolled bill passed by the legislature to determine as to whether or not such notice had been published. The leading case upon the subject from the supreme court of Mississippi was *Ex Parte Wren*, 63 Miss. 512. The case was referred to with approval by this Court in the opinion of Mr. Justice Harlan in *Marshall Field & Co. v. Clark*, 134 U. S. 649, 36 L. ed. 294. Other cases from the supreme court of Mississippi directly in point are *State Ex Rel v. Jackson*,

119 Miss. 729, *Adams, Rev. Agt. v. Noble*, 103 Miss. 393; *Postal Telg. Co. v. Shannon*, 91 Miss. 476, *Hunt v. Wright*, 70 Miss. 307, *Swan v. Buck*, 40 Miss. 269, *Riley v. Ammon*, 143 Miss. 861, *Royal Ins. Co. v. Levee Commissioners*, 95 Miss. 168, *Telg. Co. v. Robertson*, 116 Miss. 204.

2nd.

Respondent's Case Distinguished.

In the case of *Chicago & St. Paul Railway Co. v. Westby*, 178 Fed. 619, there was a law providing for employers liability. It dealt with the police power and not the taxation power of the state.

In the case of *Citizens Telegraph Co. v. Fuller*, 229 U. S. 322, 57 L. ed. 1206, this Court said:

> *"It may therefore be said that in taxation there is a broader power of classification than in some other exercises of legislation."*

We can best illustrate our position by differentiating the case of *Fiscal Court of Owen County v. Cox Co.* (Ky.) 117 S. W. 269 21 L. R. A. (N. S.) 83, where the state of Kentucky placed a tax of $75.00 on the use of each three-horse wagon and a tax of $200 on each four-horse wagon operated for business. The proof in the case showed, however, that the distinction was arbitrary; that the operator of a four-horse wagon could not haul any more freight or earn any more income and had no substantial advantage of a three-horse wagon.

The case of *A. & P. Tea Co. v. Doughton*, 196 N. C. 145,

illustrates the point. In that case a tax was measured upon the number of stores, intending to reach chain stores. The tax was imposed upon the operator of more than five stores. The proof showed, however, that there were singly operated stores which (a) carried larger stocks of goods; (b) exceeded five stores in gross sales; (c) that the net profit as applied to gross sales had no relation to the number of stores, therefore, the classification based on the number of stores was arbitrary.

In the present case, however, we have a very different situation. Counsel concede that the tax is for the purpose of raising funds for the construction and maintenance of levees along the Mississippi river. In other words, the tax is for the purpose of constructing a local improvement and is assumed to be measured by the benefit recived. Even if it should be said that mere mileage alone was not sufficient, the petitioners have not rested their case merely on the question of mileage. They have shown the very great diversity in circumstances and situation as applied to the petitioner railroad company for the purpose of showing that it was impossible for it to receive the same proportion of benefit from the construction and maintenance of the levee system as the Yazoo and Mississippi Valley Railroad Company. (a) Its earning power is infinitely less. (b) The construction of its railroad is infinitely inferior. (c) Its dangers to the overflows of the Mississippi River are vastly less since it runs east and west and approaches the river north of the center of the district, and has approximately only a 40% exposure. (d) The benefits to be derived on the part of the Yazoo and Mississippi Railroad Com-

pany as compared with the petitioner railroad company are out of all proportion to that received by the Columbus & Greenville Railway Company. (e) The value of the roadbed of the railway company petitioner is one-thirty-second of the Yazoo and Mississippi Valley Railroad Company. See agreement of counsel, R. 70. (f) The Columbus & Greenville Railway Company was classified by the Mississippi Railroad Commission under chapter 118 Mississippi laws 1926 (petition for writ of certiorari—R. p. 44) as a third class railroad, while the Yazoo & Mississippi Valley Railroad was classified as a first-class railroad (R. 43).

In in this case we are not confronted with a situation where the classification is justified merely on number of miles. We have number of miles plus other facts establishing conclusively the totally disproportionate benefits which the petitioner railroad company would be expected to receive from the construction and maintenance of the levee within the district.

Respondent's counsel, page 15, make the following statement:

> "The classification in the case at bar is based solely upon a mileage basis. The value of the railroad property, the business done, the gross earnings, the direction of the railroad, its closeness to the river, or even the number of years in operation are not taken into consideration."

In this counsel are in error. Petitioner offered to prove and proved the vast dissimilarity between petitioner railroad company in the district and that of the Yazoo and

Mississippi Valley Railroad Company operated in the district.

The case of *Southern Railway Co. v. Green*, 216 U. S. 400, 54 L. ed. 536, was a case where a tax was imposed upon a foreign corporation, and no such tax imposed upon a domestic corporation. The classification was, of course, arbitrary. The tax in this case is uniform as to each class.

The case of *Mary L. Milheim et al. v. Moffat Tunnel Improvement District*, 262 U. S. 710, 67 L. ed. 1194, bears no relation to the present case. In that case a state legislature had created a tunnel improvement district and assessed the costs thereof upon land-owners within the district. The case turned upon the question as to whether or not the use was a public one. The state court so decided and this court affirmed the decision. This court further held that there was no arbitrary classification in including certain lands within the district. There is nothing in the case to throw the slightest light upon the question involved in this controversy.

In *Myles Salt Co. v. Iberia, etc.*, 239 U. S. 478, 60 L. ed. 392, this court held that the establishment of a drainage district, which includes lands not susceptible to benefit by the district, was an improper inclusion, and denied to the interested parties constitutional rights.

In the case of *Gulf, C. & S. F. R. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, the court dealt with an act relating to the police power of a state and not with the taxation pow-

er, and the case throws no light upon this controversy.

The case of *Edward Voight v. City of Detroit*, 184 U. S. 115, 46 L. ed. 459, dealt entirely with the question as to what kind of notice was due process of law in making assessments for benefits. The case bears no relation whatever to the present case.

The case of *Carles U. Cotting v. Godard*, 183 U. S. 79, 46 L. ed. 92, dealt with the exercise of the police power of the state, and had nothing to do with the taxation power. Besides, the statute restricted the charges which should be made by certain corporations for receiving and selling live-stock, whereas no similar charge was made on other corporations engaged in a similar line of business. This court held that merely the amount of business done was not a proper classification. In the present case, however, we have demonstrated that the Columbus & Greenville Railroad Company was of inferior construction and incapable of rendering the same character of service as the Yazoo and Mississippi Valley Railroad Company, and that it could not possibly receive the same benefit and protection from the levee system did the Yazoo and Mississippi Valley Railroad Company.

Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 72 L. ed. 770, was a case in which this court held that a Kentucky statute basing the fee for recording mortgages upon the maturity of the indebtedness was not a sufficient but was an arbitrary classification. Under the act of 1926, however, the classification of the Columbus & Greenville Railroad Co. is shown to be reasonable and proper.

The case of *Thos. Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, dealt with the police power of the state to prevent an illegal combination. The case was not a taxation case. This court simply held that since the statute prohibited combinations on the part of certain persons and permitted the same combinations on the part of producers, the act was void.

In the case of *Nashville, C. & S. Ry. Co. v. Taylor*, 86 Fed. 168, was a case which involved a discriminatory ad valorem assessment of property for taxation by a local taxing board. The property of the railroad company was sought to be taxed at 100% of its value, while other property was assessed at a much lower valuation. The cases are not parallel, but we might say that is exactly what we are trying to do in this case, to prevent an enforcement of the statute which taxes the petitioner's railroad company at a rate of taxation out of proportion to the benefits received.

The case of *Shaefer v. Carter*, 252 U. S. 237, 64 L. ed. 445, simply dealt with the constitutionality of a state income tax and bears no relation whatever to the questions involved in this case.

3rd.

Effect of This Classification.

Counsel argue that the act of 1926 placing a tax of $50 per mile on the Columbus and Greenville Railway Co. within the district discriminates against the Yazoo and Mississippi Valley Railroad Company. (a) Counsel states that a narrow gauge railroad company would have to pay $87.50

per mile for the privilege of operating its line in the district, whereas the petitioner would pay $50. There are a number of replies to this contention, one which we deem sufficient is that the record with exhibits undisputedly shows that there are no narrow gauge lines of railroad in the district. The court will find attached to the record and briefs a map showing the railroad mileage in the Mississippi levee district. A comparison of this map with the classification (R. 43) and the appendix to petitioner's original brief on page 44 will demonstrate that the only two railroads in the district and the only two which were in the district at the time the act was passed, were the Yazoo and Mississippi Valley Railroad and the Columbus and Greenville Railway, neither of which are narrow gauged roads. There will be no dispute upon this question. This contention was therefore foreclosed adversely to the respondent in the case of *Crescent Cotton Oil Co. v. State of Mississippi*, 257 U. S. 129, 66 L. ed. 166, wherein the court used the following language:

> "The record before us shows that before the law assailed was enacted, cotton gins had been operated in Mississippi by individuals as well as by corporations, but there is no showing that oil mills and cotton gins were both operated by an individual or by groups of individuals."

(b) We are entitled to have the validity of the act of 1926 in respect to the fourteenth amendment measured by a comparison with the main line of the Yazoo and Mississippi Valley Railroad Company.

In the case of *C. & O. Ry. Co. v. Atty.-Gen'l*, 230 U. S. 513, 57 L. ed. 1597, the court used the following language:

"If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws."

There are only two standard gauge main lines of railroad in the levee district: one is the Yazoo and Mississippi Valley Railroad, and the other is the Columbus & Greenville Railway; and as to whether or not the act of 1926 is discriminatory, such discrimination must be determined by a comparison of its relation to the Yazoo and Mississippi Valley Railroad, since those two railroads are in the same class and are the only ones in the district of the same class. See *Quaker City Cab Co. v. Pa.*, 277 U. S. 389, 72 L. ed. 927; *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 32, 72 L. ed. 770. And it may be noted by reference to the classification had by the Railroad Commission (R. 43) that the Columbus & Greenville Railway Co. is the only main line railroad in the state of Mississippi classified as No. 3; and the supreme court of the state of Mississippi has decided that this classification is binding upon it. *R. R. Co. v. State*, 110 Miss. 290 discussed in original brief page 25.

Opposing counsel take the position that there are certain branch lines in the district which will pay $210.00 per mile, although the Columbus & Greenville Railway Company is only required to pay $50 per mile. There are a number of replies to this proposition. *First*, branch lines are in an entirely separate class from main lines, and, as above stated, the question of discrimination must be determined by the uniformity or lack thereof as applied to classes. *Second*, it must be noted that the branch lines referred to are feed-

ers for the great interstate carrier, the Yazoo and Mississippi Valley Railroad Company, which, from an inspection of the map forming part of the record in this case, discloses a perfect network of main and branch lines in the levee district. In the evidence offered by the petitioner in the trial court in respect to the superior construction, earning capacity, enormous values exposed to the hazards of the Mississippi river, etc., the evidence introduced and offered dealt both with the Yazoo and Mississippi Valley Railroad Company and its branch lines (R. 16-42), and the agreement of counsel showing that the petitioner railroad company property was assessed for ad valorem taxes at $1,000 a mile, and that of the Yazoo and Mississippi Valley Railroad Company $32,000 per mile, was applicable to both the main and the branch lines (R. 70). Therefore, the branch lines of the Yazoo and Mississippi Valley Railroad Company forming part of the great network of the great Yazoo and Mississippi Valley system, fall into an entirely different class from the Columbus and Greenville Railway Company.

Counsel make special reference to the line running from Rosedale to Cleveland. Returning to Record page 43, classification of the Railroad Commission, we find that line, designated as Rosedale to Dockery, as a main line, and is classified as No. 2 railroad. When we return to the branch line from Kelso to Holly Bluff, while it is a branch line, it is a feeder of the great Yazoo and Mississippi Valley Railroad Company. An examination of the map shows that it is located at the extreme south end of the district and is exposed to the flood water of the Mississippi River 100%, and, therefore, demands the full measure of protection on the part of the levee district.

Again we call Your Honors' attention to the fact that the Yazoo and Mississippi Valley Railroad Company is not objecting to the payment of such privilege tax as may be imposed upon it for the construction and maintenance of the Mississippi river levee, as compared with the tax imposed upon plaintiff in error, and we submit that the respondent, W. J. Miller, state tax collector of the state of Mississippi, cannot be heard to question the validity of any such tax, as to which we submit the following authorities:

Officer must have personal interest in controversy before he can raise a federal question. *Stewart v. Kansas*, 239 U. S. 14, 60 L. ed. 120; *Smith v. State of Indiana*, 191 U. S. 138, 48 L. ed. 125; *Caffrey v. Oklahoma*, 177 U. S. 346, 44 L. ed. 799.

Opposing counsel criticize our classification, original brief 22, and state that the provision Act of 1926 providing for a maximum tax of $50.00 per mile on minimum mileage not to exceed twenty-five miles within the district does not include narrow gauge or branch lines. The Supreme Court of Mississippi has never passed upon this point. However, the position is not material. We have shown that there are no narrow gauge railroads in the district, and that such branch or feeder lines as may be in the district form part of the great Yazoo & Mississippi Valley Railway System, which fall in a separate and distinct class. The petitioner railway company likewise falls in a separate class. It is an independent intrastate main line, without any trunk line affiliation and without branches. Its physical condition, lack of earning power, infinitely lower vaulation and diminished exposure to the flood waters of the Mississippi

River not only justifies but requires different classification from that of the main line of the Yazoo & Mississippi Valley Railroad and /or its branches.

4th.

Petitioner's Position Not Inconsistent.

Respondent's counsel claim that the position of petitioners is inconsistent. This is not true, as will appear from what is said in our original reply brief. Upon the other hand, petitioners' position is clear and consistent. *First*, that the act of 1926 is valid, does not violate the fourteenth amendment to the constitution of the United States, and since the petitioner, the railroad company, had discharged the liability imposed thereunder, it was, under the fourteenth amendment, entitled to immunity from further liability. *Second*, that irrespective of this question, the imposition of the same tax, towit, $350 per mile, on the petitioner railroad company as is imposed upon the main line of the Yazoo and Mississippi Valley Railroad Company, taking into consideration the disproportionate earning power, property values and exposure to flood waters from the Mississippi River on the part of petitioner railway company, would cause said chapter 282 Laws 1914 to violate the fourteenth amendment to the constitution of the United States.

5th.

Act of 1926 Only Partially Repealed.

Counsel claim that the act of 1926 was only partially repealed. We are not concerned with the discussion as to whether or not the act was wholly or partially repealed. The

supreme court of Mississippi held the act of 1926—at least that portion of it applicable to petitioner—as being violative of the fourteenth amendment to the constitution of the United States. Of that petitioner complains. The court then reinstated the act of 1914 and enforced it under the facts and circumstances of this case against petitioner, which was violative of the fourteenth amendment of the constitution of the United States, and of which petitioners complain.

Counsel state that the Yazoo and Mississippi Valley Railroad Company is a foreign corporation. While such would not be material, this is an incorrect statement. This court will take judicial notice that the Yazoo and Mississippi Valley Railroad Company is a Mississippi corporation. *Y. & M. V. R. R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395. *The same v. Board of Levee Commissioners*, 132 U. S. 190, 33 L. ed. 308. *The same v. Brewer*, 231 U. S. 245, 58 L. ed. *The same v. Clarksdale*, 207 U. S. 10, 66 L. ed. 104.

Opposing counsel have cited no case in any manner militating against the rights asserted by plaintiffs in error herein. It will readily appear to the Court that the questions involved are novel and of such importance as to justify the issuance of a writ of certiorari.

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